Supreme Court, U.S.
FILED
JAN 26 1998
CLERK

No. 97-874

In The

Supreme Court of the United States

October Term, 1997

KURT M. SCHNEIDER,

Petitioner,

vs.

GEORGE A. HORMEL & CO., ALAN RASELL and HORMEL FOODS CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HORMEL FOODS CORPORATION

JAMES D. MORGAN
Counsel of Record
STEPHEN J. ROPPOLO
FISHER & PHILLIPS L.L.P.
Attorneys for Respondent Hormel Foods Corporation
201 St. Charles Avenue
Suite 3710
New Orleans, Louisiana 70170-3710
(504) 522-3303

144297

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

25 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was the Fifth Circuit's *per curiam* decision approving the district court's jury instruction regarding the plaintiff's burden of proof in an age discrimination case consistent with *St. Mary's Honor Center v. Hicks*?

2. May a district court properly instruct the jury that a plaintiff is required to prove not only that an employer's proferred reason for adverse employment action is false, but also that illegal age discrimination was the actual reason?

RULE 29.6 CORPORATE DISCLOSURE

The Certificate of Interested Parties contained in the Petition is substantially correct. Pursuant to Supreme Court Rule 29.6, Respondent submits the following corporate disclosure:

Domestic Operations

Hormel Foods Corporation is the parent corporation. All domestic affiliates and subsidiaries are wholly owned.

International Operations

Hormel Foods Corporation has an interest in Campofrio Alimentacion, S.A. in Madrid, Spain, where stock is publicly traded.

Hormel Foods Corporation also has an interest in Pozmeat in Pozman, Poland, where stock will be publicly traded beginning on March 1, 1997.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Rule 29.6 Corporate Disclosure	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statutes at Issue in this Case	1
Statement of the Case	1
A. Introduction	1
B. Background Facts	2
C. The Challenged Instructions	4
Reasons for Denying the Writ	4
I. The Fifth Circuit's Decision Is Consistent With *Hicks*.	4
II. No Conflict In The Circuits Exists Regarding The Application Of *Hicks* In A Jury Setting.	7
III. Nothing In The Jury Instructions Prevented A Finding Of Discrimination.	8
Conclusion	10

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aka v. Wash. Hosp. Ctr., 116 F.3d 876 (D.C. Cir.), *judgment vacated on other grounds*, 124 F.3d 1302 (D.C. Cir. 1997) (*en banc*) 7, 8

Fisher v. Vassar College, 114 F.3d 1332 (2nd Cir. 1997) 7

Gautreaux v. Scurlock Marine, Inc., 84 F.3d 776 (5th Cir. 1996) 2, 5

Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1253 (1993) 6

Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995) 8

Smith v. Stratus Computer, Inc., 40 F.3d 11 (1st Cir. 1994), *cert. denied*, __ U.S.__, 115 S. Ct. 1958 (1995) ... 8

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) ..... i, 1, 2, 4, 5, 6, 7, 8

Statutes Cited:

29 U.S.C. § 621, *et seq.* 1

42 U.S.C. § 1981 1

Contents

Page

Rule Cited:

Supreme Court Rule 15.2 2

APPENDIX

Appendix A — Relevant Jury Instruction Excerpts ... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Louisiana Denying Motion For New Trial Entered April 19, 1996 ..... 4a

OPINIONS BELOW

In addition to the opinions cited in the Petition, Respondent believes the district court's unreported Order and Reasons denying Petitioner's Motion for Judgment as a Matter of Law and, in the alternative, Motion for New Trial is germane to the issues raised in the Petition. *See* R. App. B, p. 4a.

STATUTES AT ISSUE IN THIS CASE

Respondent agrees that the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* is at issue in this case and is properly included in the Petition. Respondent rejects Petitioner's inclusion of 42 U.S.C. § 1981 in his Petition, as this statute was never raised in Petitioner's original Petition before the district court. Moreover, 42 U.S.C. § 1981 is not applicable in cases alleging discrimination on the basis of age.

STATEMENT OF THE CASE

A. Introduction

Petitioner challenges the *per curiam* judgment of a panel of the United States Court of Appeals for the Fifth Circuit regarding a jury instruction in an age discrimination case. Essentially, Petitioner argues that the district court's instruction was contrary to *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), in which this Court clarified the plaintiff's burden of proof in employment discrimination cases.

The instruction given by the district court (and to which Petitioner now objects) is taken essentially *verbatim* from *Hicks*. Petitioner's references to "pretext-plus," "pretext-only," "permissive inference," *etc.* are misplaced. The jury was instructed simply that it needed to find that age was "a

determinative factor" in Respondent's decision to terminate him before it could find for Petitioner.[1] The instruction recites *Hicks'* teaching that proof of pretext alone is insufficient to support a finding of age discrimination.

B. Background Facts

In light of the admonition found in Rule 15.2 of the Rules of the Supreme Court, Respondent is compelled to address Petitioner's "Background Facts." Substantial liberties have been taken regarding the evidence presented to the jury at trial.

Petitioner states that he "began receiving scathing reviews" after Alan Rasell became his supervisor in 1990. Petition for Writ of Certiorari at 5. Evidence introduced at trial proved that Petitioner received several below average performance reviews from Clayton Steele, Rasell's predecessor. Vol. 6, Tr. 45-53, 56-58; Plf. Exs. 24, 25, 26, 27 and 28. Steele was older than both Rasell and Petitioner.

Petitioner further suggests that he was one of two salespeople under Rasell's supervision who were over 40, and that both employees were involuntarily terminated. Petition for Writ of Certiorari at 5 and 7. In fact, Kennedy voluntarily resigned, and her resignation letter to that effect was introduced into evidence. Plf. Exs. 209, 210 and 211; Vol. 4, Tr. 545, 576.

Petitioner characterizes the memoranda he received from Rasell as an effort to "pester" and "harass" him. Petition for

---

1. *See* R. App. A, pp. 1a-3a, which contains all relevant portions of the lower court's jury instructions. The version included in Petitioner's appendix is notable for its omission of crucial portions of the court's instructions. In deciding whether jury instructions are erroneous, the reviewing court must consider the instructions as a whole. *See, e.g., Gautreaux v. Scurlock Marine, Inc.*, 84 F.3d 776 (5th Cir. 1996).

Writ of Certiorari at 5 and 7. The evidence shows that Rasell's letters pointed out real performance deficiencies, including Schneider's failure consistently to perform "ride withs" with his distributors, call on end users with sufficient frequency, prepare necessary paperwork and submit it on time, and follow up on operator calls. Plf. Exs. 32-48; Vol. 7, Tr. 146-147. Respondent demonstrated that Petitioner was not performing at a "fully competent" level.

Petitioner lists certain performance goals which he deems "unattainable," but fails to mention the numerous extensions he received in order to permit him every chance to become a competent salesman. Plf. Exs. 40, 41 and 44; Vol. 7, Tr. 161-164. Demonstrative evidence introduced by Respondent at trial graphically demonstrated the number of opportunities afforded Petitioner and that a number of these "unattainable" goals were in fact reached.

One of the facts which influenced Respondent to terminate Petitioner was that none of his three major accounts preferred that he remain as their salesman when offered a chance to switch to a new salesperson who was being assigned to the territory. Vol. 1, Tr. 51-52. Petitioner's statement that "the account manager for Arrow hesitated at the thought of [replacing Petitioner with another salesman]" is unsupported by the evidence and is patently false.

Significantly, the district judge stated the following in his Order and Reasons denying Plaintiff's Judgment as a Matter of Law:

> Contrary to the plaintiff's assertions ample evidence was placed in the record of this case by both parties. The jury chose to accept that evidence presented by the defendant and found that age was not a factor in Mr. Schneider's termination.

R. App. B at 7a.

C. The Challenged Instructions

As noted above, Petitioner has failed to include all relevant portions of the instructions in both his Petition and its Appendix. A complete version is contained in Respondent's Appendix. *See* R. App. A.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH *HICKS*.

This Court set forth the plaintiff's burden of proof in a discrimination case in *St. Mary's Honor Center v. Hicks*, *supra*. To the extent that the burden to be carried by a plaintiff at the trial of an employment discrimination case may have been confusing before 1993, it has been clear since then.

Petitioner's primary quarrel is with the following portion of the jury instructions:

> [P]laintiff, Kurt M. Schneider, must prove *both* that the reason given by the defendant, Hormel Foods Corporation, for discharging him is false or should not be believed *and* that the true reason he was selected for discharge is due to age discrimination.

R. App. A at 2a. According to Petitioner, the requirement that the plaintiff prove that the defendant's proffered explanation was false together with the obligation to prove age discrimination is an invalid "pretext plus" instruction and contrary to *Hicks*.

This Court made it clear in *Hicks* that simply refuting the defendant's reason for the adverse employment action was not enough. A company might give an inaccurate portrayal of a plaintiff's termination, but that does not necessarily mean that the true reason was discriminatory. The point of *Hicks* is the rejection of the Eighth Circuit's finding that evidence of pretext alone equals discrimination. Thus, a finding of pretext is not the same as a finding that there was a pretext for discrimination. *Hicks*, 509 U.S. at 515-16.

Petitioner argues that the district court's instruction prevented the jury from inferring discrimination from a combination of evidence establishing his *prima facie* case and evidence of pretext. As the Fifth Circuit correctly noted in its *per curiam* decision, the instruction placed no restrictions on the jury regarding inferences to be drawn from the evidence. The jurors were not told that they had to find a *prima facie* case and then look for additional evidence of discrimination. One of the many flaws in Petitioner's arguments is his failure to recognize that the *prima facie* case and burden-shifting analysis "drops out of the picture" when the case is before the jury. *Hicks*, 509 U.S. at 510-11. Thus, the jury, is freed from such arcane legal concepts such as *prima facie* case and burden-shifting and is required only to decide whether the plaintiff has proved by a preponderance of the evidence whether age was a determinative factor in the employer's decision.

The portion of the instructions which Petitioner finds objectionable must not be viewed in isolation. *Gautreaux, supra*. Petitioner has ignored the court's instruction that:

> Plaintiff need not prove that age was the only reason, but he must prove that his age was a determinative factor in prompting his employer to select him for discharge. By a "determinative factor" I mean that

> but for the defendant's motivation to discriminate against the plaintiff because of his age the plaintiff would not have been selected for discharge. In order to find for the plaintiff, you must find that the plaintiff's employer either discharged him because of his age or regarded his age as a negative factor in its consideration. The law does not require the defendant to give the plaintiff special treatment because he is over the age of 40. However, the law prohibits the defendant from using the plaintiff's age as the reason for or as a negative factor in its decision to discharge him.

R. App. A at 2a-3a. In addition, the trial judge concluded the sentence about which Petitioner complains by further explaining what he meant by "age discrimination": "that the defendant discharged him because of his age or regarded his age as a negative factor in its decision." *Id.* All of this immediately followed the portion of the jury instruction which is consistent with *Hicks* and to which Petitioner objects. Although Respondent maintains that none of the district court's instruction was improper, the full instruction makes clear the jury's task even if some portion of it might not have been completely enlightening.

Petitioner would have the lower court instruct the jury that if the plaintiff makes out a *prima facie* case, then that evidence coupled with evidence of pretext will permit a finding of discrimination. But such an instruction presumes that the burden-shifting analysis has somehow entered the jury room, a result which was avoided here by the district court's refusal to instruct the jury on such matters, relying upon *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1253 (1993). *See* Order and Reasons of the district court denying Petitioner's Motion for Judgment as a Matter of Law, R. App. B at 7a. Spared the task of trying to

figure out burden-shifting, the jury was directed to review all of the evidence (both direct and circumstantial) and decide the ultimate question of age discrimination. This is precisely what *Hicks* requires.

II.

NO CONFLICT IN THE CIRCUITS EXISTS REGARDING THE APPLICATION OF *HICKS* IN A JURY SETTING.

Petitioner claims that there is a "split" among the circuits about whether *Hicks* requires plaintiffs to prove facts above-and-beyond those needed to establish the *prima facie* case and that the employer's stated reason is false or unworthy of credence. Petition for Writ of Certiorari at 12-15. However, none of the cases cited by Petitioner involve a jury trial or the appropriate instructions to be given jurors.[2] This is significant because, as noted above, once the case reaches the jury, the *prima facie* case and its presumption in favor of the plaintiff is no longer relevant. The jurors are free to consider all the evidence presented by the parties in an effort to decide whether age was a determining factor in the employer's decision to take adverse action against an employee. This is what happened at the trial in this case.

To the extent that the circuits have grappled with the application of *Hicks*, it is in the context of summary judgment. *See Aka v. Wash. Hosp. Ctr.*, 116 F.3d 876, 881 (D.C. Cir.), *judgment vacated on other grounds*, 124 F.3d 1302 (D.C. Cir.

---

2. Petitioner inaccurately states that *Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. 1997), was an appeal from a jury verdict. ("In *Fisher*, a discharged college professor convinced a jury. . ." Petition for Writ of Certiorari at 14.) In fact, the trial in *Fisher* was heard by a judge, not a jury.

1997) (*en banc*); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995); and *Smith v. Stratus Computer, Inc.*, 40 F.3d 11 (1st Cir. 1994), *cert. denied*, __ U.S.__, 115 S. Ct. 1958 (1995). Whether the *prima facie* case alone, coupled with some evidence of pretext, is enough to survive summary judgment is a question that has proven difficult for federal courts in the years since *Hicks*. However, to suggest that a "split" in the circuits exists on this issue is a bit of a stretch. In any event, courts considering cases that proceed to a jury are presented fewer problems. Juries do not grapple with *prima facie* cases and rebuttable presumptions, and so whether "something more" is required above-and-beyond the facts which establish the *prima facie* case never arises once jurors begin to deliberate an employment discrimination case. It is no surprise that Petitioner failed to cite a single case to support his assertion that the circuits are split concerning how juries should be charged in light of *Hicks*.

III.

NOTHING IN THE JURY INSTRUCTIONS PREVENTED A FINDING OF DISCRIMINATION.

Petitioner appears to object to the trial court's instruction because he believes it required him to prove discrimination with "direct evidence." Petition for Writ of Certiorari at 15-16. Petitioner's impassioned missive against requiring plaintiffs to present direct evidence is irrelevant here. While he concluded that the district court's instruction prevented the jury from relying on non-direct (or circumstantial) evidence, nothing could be further from the truth.

Petitioner ignores the fact that the district court specifically instructed the jury that it could consider circumstantial evidence.

> *You may consider either direct or circumstantial evidence.* "Direct evidence" is the testimony of one who asserts actual knowledge of a fact such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating a fact to be proved. The law makes no distinction between the weight to be given to either direct or circumstantial evidence.

R. App. A at 1a (emphasis added). Moreover, the court properly instructed the jury about the inferences it could draw from the evidence:

> So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and the exhibits as you feel are justified in light of your common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

Id.

Petitioner will receive no argument from Respondent that plaintiffs in discrimination cases should not be required to produce direct evidence of discrimination in order to prevail. But his suggestion that the district court and the Fifth Circuit have effectively done so ignores reality. Petition for Writ of Certiorari at 16-17. Indeed, the *McDonnell-Douglas/Burdine* burden-shifting analysis was created precisely because most discrimination cases involve circumstantial — not direct — evidence. This analysis is set aside, however, when the jurors enter the jury room. Then, the only relevant question is whether

plaintiff has proved by a preponderance of the evidence that the employer was motivated by illegal discrimination, and the jury may draw whatever inferences from the facts it believes appropriate.

CONCLUSION

For the reasons and authorities cited herein, Respondent urges the Court to deny certiorari. Petitioner has not demonstrated a compelling reason for the Court to rule on the merits of this case. Moreover, the Fifth Circuit's *per curiam* decision is a particularly poor vehicle to address any issues of importance, even had they been raised here.

Respectfully submitted,

JAMES D. MORGAN
Counsel of Record
STEPHEN J. ROPPOLO
FISHER & PHILLIPS L.L.P.
Attorneys for Respondent
Hormel Foods Corporation
201 St. Charles Avenue
Suite 3710
New Orleans, Louisiana 70170-3710
(504) 522-3303

APPENDIX

APPENDIX A — RELEVANT JURY INSTRUCTION EXCERPTS

* * *

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and the exhibits as you feel are justified in light of your common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

You may consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating a fact to be proved. The law makes no distinction between the weight to be given to either direct or circumstantial evidence.

* * *

In this case the plaintiff, Kurt M. Schneider, has sued the defendant, Hormel Foods Corporation, alleging discrimination under the Age Discrimination in Employment Act. This Act makes it unlawful for an employer to discharge an employee above the age of 40 because of that employee's age.

The plaintiff claims that the defendant discriminated against him by discharging him because of his age. Now, in order for the plaintiff to recover on his age discrimination claim, he must demonstrate:

Appendix A

(1) That he was above the age of 40;

(2) That he was discharged;

(3) That he was qualified for the position; and

(4) That his age was a determinative factor in the defendant's decision to discharge him.

In this case it is undisputed that the plaintiff was 49-years old and that he was, in fact, discharged. Thus, the elements in dispute are whether the plaintiff was qualified for the position and whether the defendant selected the plaintiff for discharge because of his age or regarded his age as a negative factor in its consideration.

The defendant denies that it selected the plaintiff for discharge because of his age or considered his age as a negative factor in its decision. The defendant assumes (sic) that the plaintiff was discharged due to his poor work performance.

The plaintiff, Kurt M. Schneider, must prove *both* that the reason given by the defendant, Hormel Foods Corporation, for discharging him is false or should not be believed *and* that the true reason he was selected for discharge is due to age discrimination; that the defendant discharged him because of his age or regarded his age as a negative factor in its decision.

Plaintiff need not prove that age was the only reason, but he must prove that his age was a determinative factor in prompting his employer to select him for discharge. By a

"determinative factor" I mean that but for the defendant's motivation to discriminate against the plaintiff because of his age the plaintiff would not have been selected for discharge. In order to find for the plaintiff, you must find that the plaintiff's employer either discharged him because of his age or regarded his age as a negative factor in its consideration. The law does not require the defendant to give the plaintiff special treatment because he is over the age of 40. However, the law prohibits the defendant from using the plaintiff's age as the reason for or as a negative factor in its decision to discharge him.

* * *

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DENYING MOTION FOR NEW TRIAL ENTERED APRIL 19, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 93-1264

SECTION "L"

KURT M. SCHNEIDER

VERSUS

GEO. A. HORMEL & COMPANY

ORDER AND REASONS

Before the Court is plaintiff's motion for judgment as a matter of law and, in the alternative, motion for new trial. A trial in the above captioned matter was held on October 30, 1995 and a verdict was returned in favor of the defendant on November 9, 1995. The jury's verdict was made the judgment of this Court on November 15, 1995. The plaintiff's motion was heard without oral argument. For the following reasons, the plaintiff's motion for judgment as a matter of law and, in the alternative, motion for new trial is DENIED.

Appendix B

BACKGROUND

The plaintiff, Kurt M. Schneider, brought the above captioned matter under the Age Discrimination Employment Act (ADEA) claiming that the defendant, Geo. A. Hormel & Company (Hormel), terminated him because of his age. *See* 29 U.S.C. §621 *et. seq*. The defendant countered the plaintiff's claim with the contention that Schneider was fired because of his overall poor job performance.

Mr. Schneider started work for Hormel in 1972 as a relief salesman. The plaintiff was able to maintain his employment with the company without incident until 1990. In 1990, Hormel restructured its sales division and created a separate section for selling food service products which was the plaintiff's assigned area. This restructuring brought into focus- according to the defendant- the plaintiff's productivity as a salesperson. At this same time, Mr. Alan Rasell was made plaintiff's supervisor and rated him as a "2A" meaning "needed to improve or risk losing his job." In 1992, Rasell set six performance goals for Mr. Schneider to meet in order to keep his job and gave him six months to complete them. The plaintiff was unable to fulfill his goals and was terminated on August 4, 1992 for poor job performance.

At trial, the plaintiff alleged that the goals set by Hormel were unattainable and created merely as a pretext to terminate him. Mr. Schneider put forward testimony and various documents in his attempt to show that his age was the real reason he was fired by the defendant. The defendant presented evidence to support their assertion that the plaintiff had performed poorly over several years and was terminated only because of his poor

job performance. After a two week trial and substantial deliberations, the jury returned a verdict in favor of the defendant.

LEGAL STANDARD

A motion for judgment as a matter of law, and in the alternative, motion for a new trial is a matter of discretion for the trial court and is not subject to review except for abuse of discretion. *See* Fed. R. Civ. P. 50(b). A motion for a judgment as a matter of law requires that the Court view the evidence in the light most favorable to the jury verdict. *Conkling v. Turner,* 18 F.3d 1285 (5th Cir. 1994). There must be "no legally sufficient evidentiary basis for a reasonable jury to find for" the non-moving party. Fed. R. Civ. P. 50(a). Judgments as a matter of law should not be granted merely because the Court views the evidence differently than the jury.

A motion for new trial may only be granted if the evidence is so strong that a reasonable person could not have found as the jury did. *Jackson v. Taylor,* 912 F.2d 795, 797 (5th Cir. 1990); Fed. R. Civ. P. 59. Again, the evidence must be viewed in a light most favorable to the jury's verdict. *Id.* Finally, a new trial should not be granted unless the verdict is against the great weight of the evidence. *Conway v. Chemical Leaman Tank Lines. Inc.,* 610 F.2d 360 (5th Cir. 1980). These legal standards will be applied in the following analysis of the issues presented by the plaintiff's motion.

ANALYSIS

The plaintiff, in his voluminous motion, has essentially attacked the factual findings of the jury. He asserts that the evidence was clearly in his favor and that the "record is void of

any evidence to support the jury's verdict." The plaintiff goes on to contend that most every evidentiary ruling made by the Court in this case was in error. For example, he argues that the Court erred in not allowing testimony addressing discovery and that the Court erred in allowing the defendant to offer evidence of other employees. The discovery process in this case is well documented by the record and the Court stands by the its own rulings and those of the United States Magistrate Judge in this case.

Two assertions of error made by the plaintiff are patently false. First, the plaintiff asserts that the Court erred in instructing the jury on the burdens of proof as set forth in *Bodenheimer v. PPG Industries. Inc.*, 5 F.3d 955 (5th Cir. 1993). To the contrary, the Court rejected the defendant's argument to use *Bodenheimer* and refused to instruct the jury on the "prima facie" case. *See Oltisky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). Secondly, the plaintiff argues that he was prevented from using his laser disc to present demonstrative aids to the jury while the defendant was allowed to use its aids. In fact, the plaintiff was allowed to use his laser disc at trial but only to show items which were properly admitted into evidence. The plaintiff was only prevented from showing items which were not evidence in this case.

Contrary to the plaintiff's assertions ample evidence was placed in the record of this case by both parties. The jury chose to accept that evidence presented by the defendant and found that age was not a factor in Mr. Schneider's termination. In summary, there was a sufficient evidentiary basis for the jury to find for the defendant and such a finding was not against the weight of the evidence presented at trial.

Appendix B

CONCLUSION

For the foregoing reasons, the plaintiff's motion for judgment as a matter of law, and in the alternative, motion for new trial is DENIED.

New Orleans, Louisiana, this 17 day of April, 1996.

s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE